



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & OTIENO-ODEK, JJA)

CIVIL APPEAL No. 173 of 2011

BETWEEN

GEOREGE GIKUBU MBUTHIA.....APPELLANT

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

MOHAMUD SHEIKH HUSSEIN.....3RD RESPONDENT

(Being an appeal from the Ruling and Orders of the High Court of Kenya

at Nairobi (Waweru, J.), dated 8th July, 2011

In

H.C.C.C. No. 1203 of 2006)

JUDGMENT OF THE COURT

1. This is an appeal against a ruling dismissing an application to strike out a Bill of Costs. By Notice of Motion dated 28th December 2010, the appellant moved the High Court seeking orders that the Bill of Costs lodged by the 3rd respondent on 29th June 2007 in HCCC No. 1203 of 2006 be struck out on the ground that the Bill was scandalous, frivolous, vexatious or otherwise an abuse of the court process. In a ruling dated 8th July 2011, the Court dismissed the Motion with costs.

2. The background facts relevant to the dismissal of the Motion are as follows:

(i) On 18th June 2007, the appellant filed a Notice of Withdrawal of High Court Civil Suit No. 1203 of 2006. The Notice is dated 15th June 2007 and premised on Order XXIV Rule 2 of the Civil Procedure Rules.

(ii) On 26th June 2007, the Deputy Registrar of the court entered an order that the suit had been withdrawn with costs.

(iii) No appeal to a judge by way of Reference was preferred by the appellant against the order of the Deputy Registrar.

(iv) Upon the order of withdrawal of suit with costs having been entered and recorded, the 3rd respondent on 2nd July 2007 filed a Bill of Costs dated 29th June 2007.

(v) It is this Bill of Costs that the appellant sought to be struck out in his application before the learned judge.

3. The court record shows that appellant's notice of withdrawal dated 15th June 2007 read as follows:

“I wish to withdraw the amended plaint dated 1st December 2006, re-amended plaint dated 22nd December 2006 and re-amended plaint dated 9th March 2006.”

4. While filing the notice of withdrawal dated 15th June 2007, the appellant simultaneously filed an amended Plaint dated 15th June 2007. In the meantime, the appellant filed a “Notice to Withdraw the Withdrawal Notice dated 15th June 2007.” Hon. Lady Justice Rawal (Rtd) in a ruling dated 22nd October 2007 held that the suit was not in existence and the pleadings were closed at the time when the notice of withdrawal dated 15th June 2007 was filed.

5. Despite the foregoing, the appellant filed the Notice of Motion dated 28th December 2010 seeking an order to strike out the 3rd respondent’s Bill of Costs. Aggrieved by the Ruling of 8th July 2011 dismissing the Motion, the appellant filed a Notice of Appeal dated 13th July 2011. The Notice expressly states that it is an appeal against the Ruling given on 8th July 2011. This Notice is the foundation of the jurisdictional competence of this Court to hear and determine the instant appeal.

6. In dismissing the Motion, the learned judge expressed as follows:

“This brings me to the real and only issue in this application. That issue is whether there is on the court record an order for costs in favour of the 3rd Defendant upon which he can legitimately seek to tax his costs by the Bill of Costs filed on 29th June 2007. In other words, was the 3rd Defendant awarded costs that he could tax?

.....

There is on record an order granting the 3rd respondent costs of the suit upon the appellant’s withdrawal of his own suit. The 3rd Defendant Bill of Costs filed on 29th June 2007 is premised upon the order for costs in his favour entered on 26th June 2007. The 3rd Defendant is entitled to tax his costs of the suit. In the event, I find no merit in the Plaintiff’s application by Notice of Motion dated 28th December 2010. The same is misconceived. It is hereby dismissed with costs to the 3rd Defendant. It is so ordered.”

7. Aggrieved, the appellant in the instant appeal has raised a multitude of 18 grounds complaining *inter alia* that:

(i) The learned judge erred when he failed the general proposition that the legal burden of proof lay upon the 3rd respondent who invoked the aid of the law and asserted that judgment for costs per Order 24 Rule 3 of the Civil Procedure Rules was entered on 26th June 2007 without proving that fact by tendering evidence by way of affidavit.

(ii) It was not open to the judge to adopt a speculative explanation of costs entered in favour of the 3rd respondent without any evidence to support it.

(iii) The judge made a grave error of law when he made an order that costs were awarded to the 3rd respondent for filing a defence and defending the suit when no such defence, amended defence or re-amended defence were ever served upon the appellant.

(iv) The judge made a second grave error in failing to hold that the appellant, having a statutory right to be served with the 3rd respondent’s defences which service was not effected – the purported Deputy Registrar’s Order of 26th June 2007 and subsequent orders made on 22nd October 2007, 5th December 2007, 11th April 2008 and the Court of Appeal Order of 20th March 2009 were improperly made and therefore mere nullities.

(v) The judge erred in law when he failed to hold that the 3rd respondent did not have locus to file any preliminary objection based on unserved defences and an order which are nullities and where Civil Procedure or any other procedure turned out to be otiose and unimportant.

(vi) The judge made a simplistic and grave error of law when he commented that the 14 paragraphs of the appellant’s supporting affidavit contained matters that are absolutely irrelevant to the application at hand and therefore declined to ventilate into any of the matters deponed in the supporting affidavit.

(vii) The judge erred when he failed to hold that the Bill of Costs dated 29th June 2007 was founded upon the 3rd respondent’s unserved re-amended defence – a defence which was similarly founded upon two forged documents.

(viii) Notwithstanding Lord Mansfield’s caveat in **Holman – v-Johnson (1775)** which the appellant demonstrated at paragraph No. 11 of the affidavit sworn on 28th December 2010 in support of the Notice of Motion, the judge erred in law and turned the well-known and settled principles of constitutional, administrative and criminal law and general jurisprudence topsy-turvy.

8. The prayers in the memorandum of appeal also numerous, include:

(a) A declaration that the Deputy Registrar’s order purportedly given on 26th June 2007 is null and void.

(b) A declaration that the High Court order given on 8th July 2011 is null and void.

(c) A declaration that the orders given by Lady Justice Rawal on 22nd October, 2007 is null and void.

(d) A declaration that the Court of Appeal order given on 20th March 2009 is equally null and void.

(e) A declaration that the Agreement of Sale dated 19th April 2006 and the Conveyance by Mortgagee dated 24th April 2006 and executed by the 3rd respondent is a forgery and illegal.

(f) A declaration that the original indenture in respect of Land Reference No. 36/11/1 Eastleigh belongs to the appellant and should be surrendered to him forthwith.

(g) An order that the Registrar of Titles do cancel and expunge the forged conveyance by Mortgage which is put in the Register of Titles in favour of the 3rd respondent.

(h) An order directed at the 3rd respondent to vacate LR No. 36/11/1 Eastleigh Nairobi forthwith.

(i) The 3rd respondents Bill of Costs dated 29th June 2007 to be hereby dismissed with costs to the appellant.

9. At the hearing of this appeal, while the appellant appeared in person, Learned Counsel Mr. Amany Cohen represented the 3rd respondent. The 1st and 2nd respondents despite having been served with hearing notices did not appear. On record, in the Order of this Court dated 17th June 2015 learned counsel Mr. Munge for the 1st respondent informed this Court that the appeal does not concern his client. The Court was further informed that the 2nd respondent, the Hon. Attorney General, has not been featuring in the matter. Being satisfied that all parties had been duly served and had notice of the hearing of the instant appeal allowed the appellant and counsel for the 3rd respondent to prosecute the appeal. The court proceeded and the appellant made submission in support of the appeal.

10. The appellant submitted that the original suit was between him and the 1st respondent, HFCK; that the subject matter of the suit was still in existence; that the costs of the suit should not have been awarded by the trial court. He submitted that the judge erred by aiding and abetting fraud committed by the law firm of Ahmednassir, Abdikadir & Co. Advocates who raised a preliminary objection before Hon. Lady Justice Rawal; that he has never instructed the firm of Ahmednassir & Co. Advocates to represent him; that he has always acted in person; that the judge erred and failed to appreciate that the Ruling of 8th July 2011 was a nullity because the court circumvented its order given on 16th May 1991; that the judge erred when he failed to hold that the order made by the Deputy Registrar on 26th June 2007 is in reality so defective as to make it entirely ineffectual in the eyes of the law; that the remedy for an ineffectual order is to obtain a declaration that it is *void ab initio*; that the judge erred in failing to find that no appeal by either party is needed to expunge the alleged order of 26th June 2007 for its failure is an automatic and necessary consequence of its inherent defect. Based on the foregoing submissions, the appellant urged us to allow the instant appeal.

11. Counsel for the 3rd respondent opposed the appeal. He submitted that the appellant had withdrawn High Court Civil Suit No. 1203 of 2006; the suit was withdrawn with costs; that upon withdrawal of the suit, the 3rd respondent filed his Bill of Costs; that any party seeking to challenge the Bill of Costs can only do so by way of Reference to the High Court; that the appellant has never filed a Reference challenging the order entered by the Deputy Registrar withdrawing the suit with costs; that the order awarding costs to the 3rd respondent is still in force; that it is a trite principle of law that costs follow the event; when the appellant withdrew his suit, it follows that costs had to be awarded to the respondents; that there is no record showing that the withdrawn suit was reinstated and is alive; that an award of costs is discretionary and the appellant has not demonstrated any reason as to why this Court should interfere with the award of costs. Counsel submitted that the issue whether the suit had been withdrawn was determined by this Court in Civil Appeal No. 90 of 2008 where it was held that indeed the suit had been withdrawn. It was submitted that for the foregoing reasons, the learned judge did not err in dismissing the application to strike out the Bill of Costs.

12. We have considered the record, the Notice of Appeal, the grounds raised in the Memorandum of Appeal as well as submissions by the respective parties and the law. This is a first appeal. In the case of Abok James Odera & Associates –v- John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR this Court stated as follows regarding the duty of a first appellate court:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2 EA 212 wherein the Court of Appeal held, inter alia, that: -

„On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.?”

13. The Notice of Appeal filed in this matter expressly states that the appeal is against the Ruling of the High Court delivered on 8th July 2011. The jurisdictional competence of this Court as denoted by Rule 104 of the rules of the court is thus defined and confined to the Ruling dated 8th July 2011. Any grounds of appeal raised outside the ambit of the Notice of Appeal do not merit consideration.

14. We have carefully examined the prayers in the memorandum of appeal. Some of the prayers sought include the following:

- *A declaration that the orders given by Lady Justice Rawal on 22nd October 2007 is null and void.*
- *A declaration that the Court of Appeal order given on 20th March 2009 is equally null and void.*
- *A declaration that the Agreement of Sale dated 19th April 2006 and the Conveyance by Mortgagee dated 24th April 2006 and executed by the 3rd respondent is a forgery and illegal.*
- *A declaration that the original indenture in respect of Land Reference No. 36/11/1 Eastleigh belongs to the appellant and should be surrendered to him forthwith.*
- *An order that the Registrar of Titles do cancel and expunge the forged conveyance by Mortgage which is put in the Register of Titles in favour of the 3rd respondent.*
- *An order directed at the 3rd respondent to vacate LR No. 36/11/1 Eastleigh Nairobi forthwith.*

15. In our considered view, the Ruling dated 8th July 2007 has nothing to do with the declaratory orders itemized above and sought by the appellant in this appeal. For instance, the orders made by Hon. Justice Rawal on 22nd October 2007 and the Judgment of the Court of Appeal given on 20th March 2009 are not the subject of the Ruling dated 8th July 2007. In addition, the ruling the subject of this appeal did not consider and determine the validity of any conveyance instrument; the impugned ruling did not consider possession or occupation of the Eastleigh property and no order of vacant possession can be made on appeal against the impugned ruling.

Accordingly, we find that this Court has no jurisdiction to consider and issue any declaratory order as sought by the appellant on matters that fall outside the Ruling of the High Court dated 8th July 2011. The jurisdiction of this Court is confined and defined by the Notice of Appeal filed in this matter and as denoted by Rule 104 of the rules of the Court.

16. Turning to the other grounds raised in the memorandum of appeal, once again, it is our considered view that we have no jurisdiction to consider any and all grounds that fall outside the parameters of the Ruling dated 8th July 2011. For instance, the ruling dated 8th July 2011 does not relate to rectification or expungement of entries in the Register of Title; the ruling does not consider and deal with the allegation that a Sale Agreement was a forged document; the ruling does not relate to the alleged fraud by the law firm of Ahmednassir Abdikadir & Co. Advocates. Consequently, in our well-thought-out view, we find and hold that all grounds of appeal outside the confines of the ruling dated 8th July 2011 and the Notice of Appeal filed in relation thereto have no merit and are accordingly dismissed.

17. Parties are bound by their pleadings and on this basis we now turn to consider the merits of the instant appeal in so far as the grounds of appeal relate to the ruling dated 8th July 2011.

18. The appellant faults the learned judge for stating that judgment for costs was entered on 26th June 2007 without proving that fact by tendering evidence by way of affidavit; that an affidavit ought to have been filed to prove that indeed an order was made on 26th June 2007 awarding costs to the 3rd respondent; that in the absence of such an affidavit, the learned judge erred in law and engaged in speculative explanation that an order of costs had been made in favour of the 3rd respondent. The appellant further faults the trial court in failing to find that the appellant was never served with the 3rd respondent's defences filed in the suit before the High Court; that since the 3rd respondent never served the appellant with his statement of defence, there was no basis for costs to be awarded in favour of the said 3rd respondent. It was further submitted that the judge erred in failing to find that the Deputy Registrar's order of 26th July 2007 was *void ab initio*; that the judge erred in failing to find that the order of 8th July 2007 was made in circumvention of an earlier order made on 16th May 1991.

19. We have considered the merits of the grounds urged in support of the appeal. The learned judge in the ruling dated 8th July 2011 stated as follows:

“More importantly, I have perused the record of the court which speaks for itself. The record of the court discloses the following:

(1) On 18th June 2007, the plaintiff filed a notice of withdrawal of the suit dated 15th June 2017.

(2) On 26th June 2007, the Deputy Registrar of the court entered an order that the suit had been withdrawn with costs.”

20. In the administration of justice, there is a concept known as “sanctity of the record.” This means that the court record is prima facie proof of the correctness of the record of proceedings and entries in the court file. The concept of sanctity of record means that what is endorsed in the court record is sacrosanct. This encompasses the principle of infallibility of court records. In ***Solomon Omwega Omache & another – v – Zackery O. Ayieko & 2 others (2016) eKLR*** it was stated that the court has the duty to uphold the sanctity of the record. **Section 90** of the Kenya Evidence Act is on presumption of genuineness of reports of courts. The Section provides:

“The court shall presume the genuineness of every book purporting to be printed or published under the authority of the

Government of any country and to contain any of the laws of that country, and of every book purporting to contain reports of decisions of the courts of any country.”

21. In the instant appeal, the appellant faults the learned judge for relying on the court record and submitted that an affidavit ought to have been filed to prove that indeed there was an order withdrawing the suit with costs. In our considered view, the submission by the appellant goes against the concept of sanctity of record and presumption of genuineness of court record as provided in **Section 90** of the Evidence Act and is wholly misconceived. There is no evidence on record, and no allegation by the appellant that the court record was tampered with. For these reasons, we are satisfied that the trial judge did not err in referring to and relying on the record of the proceedings and entries in the court file. Convinced that the learned judge properly examined and analyzed the court record, we find that the judge did not err in relying on the record. We further hold that unless there is contestation and dispute on tampering or authenticity and veracity of the court record, there was no need for an affidavit to prove the contents of a court record. In the instant appeal, the appellant has not challenged the authenticity and veracity of the entry in the court record which indicates that on 26th June 2007, the Deputy Registrar recorded that the Civil Suit No. 1203 of 2006 had been withdrawn with costs. The appellant in his prayer seeks a declaratory order that the Deputy Registrar’s Order of 26th June 2007 be declared null and void. This prayer *per se* is an admission that such an order as made by the Deputy Registrar is on record.

22. Based on the concept of “sanctity of record” and the provisions of Section 90 of the Evidence Act, we hold that the ground of appeal urging that the judge erred in finding that costs had been awarded to the 3rd respondent when no affidavit had been filed to prove the same has no merit. For the same reasons, we find that there is no merit in the ground that the judge engaged in speculative explanation that an order of costs had been made in favour of the 3rd respondent.

23. In this appeal, the appellant has prayed for an order to dismiss the 3rd respondents Bill of Costs dated 29th June 2007. The substance of this prayer is that the appellant is challenging the Bill of Costs. The decision of Onyancha J. in **Sound Entertainment Limited –v- Antony Burungu and Co. Advocates [2014] eKLR**, correctly points to the procedure for challenge of a taxation of costs order by way of a reference under paragraph 11 of the Advocates’ Remuneration Order 2009. Likewise, in **Machira & Co. Advocates -vs- Arthur K. Magugu & Anor (NBI HCC Misc. App. No. 358 Of 2001)** Ringera J., as he then was, held that a decision of a taxing officer on a matter other than taxation of a specific item in the Bill of Costs can be ventilated by way of a reference to a judge in accordance with **paragraph 11** of the Advocates Remuneration Order.

24. Paragraph 11 of the Advocates’ Remuneration Order provides *inter alia* as follows:

“11. (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal....”

25. In this matter, we have examined the record of appeal. There is no record of any Reference having been made to the High Court in relation to the 3rd respondent’s Bill of Costs. The impugned ruling dated 8th July 2007 was not delivered on Reference to the High Court arising from taxation of the 3rd respondent’s Bill of Costs. Based on this fact, we decline to grant the order dismissing the Bill of Costs for the reason that the proceedings before the High Court and this Court do not arise from a Reference under the Advocates Remuneration Order.

26. For the above stated reasons, the upshot is that this appeal has no merit and is hereby dismissed with costs to the 3rd respondent. The ruling of the High Court dated 8th July 2011 be and is hereby affirmed and upheld.

Dated and delivered at Nairobi this 23rd day of Nov. 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR